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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 269

HENRY A. GARDNER, TRUSTEE OF THE ALTON RAILROAD COMPANY,

Petitioner,

vs.

FLORENCE GRISWOLD, ADMINISTRATRIX OF THE ESTATE OF LOYAL S. GRISWOLD, DECEASED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

HAROLD A. SMITH,
DOUGLAS C. MOIR,
EDWARD J. WENDROW,
Attorneys for Henry A. Gardner, as Trustee of The Alton Railroad Company.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Henry A. Gardner, as Trustee of The Alton Railroad Company, prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered in the above case on May 15, 1946.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on May 15, 1946 (R. 170). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (28 U. S. C. A., § 347 (a)).

Opinion Below.

The opinion of the majority of the Court, affirming the judgment of the District Court for the Northern District of Illinois, Eastern Division, was delivered by Circuit Judge Major (R. 160-166). This opinion was concurred in by Circuit Judge Kerner, with the exception of the statements therein to the effect that this Court has converted the Federal Employers Liability Act into a compensation law and has made a railroad an insurer of its employees (R. 166). District Judge Lindley dissented from the affirmance on the grounds that certain instructions were erroneously given (R. 166-169) on behalf of the Respondent. The opinion of the Circuit Court of Appeals is not yet reported.

STATEMENT OF THE CASE.

This was a death action under the Federal Employers Liability Act (45 U. S. C. A., § 51 *et seq.*), brought by the Administratrix of the Estate of Loyal S. Griswold, Deceased. The jury rendered a verdict for Respondent, upon which judgment was entered (R. 140). On appeal to the Circuit Court of Appeals for the Seventh Circuit, the judgment was affirmed by a divided court (R. 170).

Respondent's decedent, a brakeman employed by the Petitioner, was killed about 3:40 A. M., January 25, 1943, in Petitioner's yard at Bloomington, Illinois. This yard consists, among others, of a series of 15 tracks, numbered from 1 to 15 from the west to east and running north to south. At the south end of the yard there is an underpass known as the Chestnut Street subway (R. 12). The entrance to the subway on the west side is 50 feet west of track 6. There were three street lights on the west side of the yard, the first 19 feet north of the subway entrance (R. 85).

At about the time Griswold was killed, the weather was fair and clear (R. 11, 29, 48). Griswold's train (No. 93) was standing on track 7, with the engine at the south end of the train opposite the Chestnut Street subway (R. 12). North of 93's engine, about 10 or 12 car lengths, on track 6, the next track to the west, was the south end of a string of cars (R. 36, 40). A short time before the accident, a switch engine that moved north on track 7 removed the caboose from the south end of that train (R. 58). The switch crew then got 17 cars from track 12, which was to the east of tracks 6 and 7, and pulled the strings of cars

onto the lead in a southwesterly direction past the front end of Train No. 93's engine, and then started pushing the cars in a northerly direction on track 6, which was to the west of Griswold's train (R. 41, 72).

Scharfenberg, a member of the switch crew, was stationed at the south end of the standing cars on track 6, at a point between track 6 and 7, waiting to receive the cars (R. 42, 43). It was light enough to enable him to see the first car in the string being shoved by the switch engine when that car entered track 6, which was a point some distance south of where 93's engine was standing (R. 43, 45). He could see also one of the members of his crew riding on the leading end on the east side (R. 46). The cars were moving at a normal switching speed of from 2 to 6 miles an hour and making the usual noise of railroad cars in motion (R. 19, 21, 34, 57). As the cars approached Scharfenberg, he gave a number of signals, known as distance signals, for the purpose of informing his engineer of the distance remaining between the standing and the moving cars (R. 49). When these cars reached the point on track 6, at the front end of 93's engine, switchman Craig of the switch crew dropped off the cars for the purpose of relaying Scharfenberg's signals to his engineer (R. 43, 46, 76).

While the foregoing moves were being made, the fireman of Train 93 was on the seat box on the left, or east side, of his engine, and the engineer was seated on the west side on the seat box looking back north along his train watching his conductor who, at that time, was some thirty car lengths north of the engine, between tracks 6 and 7 (R. 17).

When the cut of cars being pushed north on track 6 was about a car length, or some 50-odd feet, away, Griswold's engineer heard them coming (R. 19).

Shortly before this Griswold—who had been on the engine—got down on the west side.

Griswold's unlighted lantern was found on the west side of track No. 6 (between tracks 5 and 6), about opposite the tank of 93's engine, and his body was found across the west rail of track 6, some six or seven car lengths north of his engine (R. 47, 59). What Griswold was doing immediately before the accident no one knows. He had no duties to perform which would require him to be on track 6.

There was no proof of the violation of any rule, custom or practice in connection with any of the moves or operations being performed at the time. There was only one rule introduced in evidence (Petitioner's Ex. No. 1, R. 69), which provides as follows:

> "When cars are pushed by an engine, except when shifting or making up trains in yards, a white light must be displayed on the front of the leading car by night."

In substance, the negligence charged was that Petitioner shoved a string of cars onto track 6 without giving the decedent a signal or warning of the approach of said cars, either by a light on the leading end or a man riding thereon (R. 4).

In the Circuit Court of Appeals petitioner contended: That there was no evidence that petitioner was either guilty of negligence or that any negligence of his was a proximate cause of the accident. These contentions were presented upon the assumption that, where liability is based on negligence, it is the function of the reviewing court to determine whether there was sufficient evidence to sustain a jury's finding. The Court of Appeals refused to perform this function, laying down the rule that "not only are these issues to be decided by the jury, but its decision is unassailable." (R. 162.)

Petitioner also urged that the trial court erred in instructing the jury that it was Petitioner's duty to furnish Respondent's decedent with a reasonably safe place in which to work, since the Complaint did not charge a breach of such duty and there was no evidence to which the instructions could be applicable; that the rule requiring a master to furnish a reasonably safe place to work had reference only to the physical condition of the place itself; and that there was no evidence of any causal connection between the physical condition of the place and the accident. The majority of the court held the giving of these instructions was not error (R. 163-166) from which ruling Judge Lindley dissented (R. 166-169).

QUESTIONS PRESENTED.

1.

In actions under the Federal Employers' Liability Act is a finding of the jury that the railroad was guilty of negligence and that such negligence was a proximate cause of the accident conclusive and not subject to review.

2.

If a jury's finding of negligence and proximate cause is not conclusive, but is subject to review, was there sufficient evidence of negligence and causal connection in the instant case to support the jury's finding?

3.

Was it reversible error to instruct the jury to the effect that it was Petitioner's duty to furnish Respondent's decedent a reasonably safe place in which to work when the complaint did not charge a breach of such duty and there was no evidence either that the physical condition of Petitioner's yard was not reasonably safe or had any causal connection with the accident?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

The Majority of the Circuit Court of Appeals Has Decided an Important Question of Federal Law Contrary to the Applicable Decisions of This Court.

A.

The Majority of the Court of Appeals in Holding That in Actions Under the Federal Employers Liability Act, a Jury's Finding as to Negligence and Proximate Cause Is Conclusive and Is Not Subject to Review on Appeal, Has Rendered a Decision Contrary to the Law.

Circuit Judge Major prefaced the statement of the evidence in this case with the following remarks:

> "Any detailed review of the evidence in a case of this character for the purpose of determining the propriety of the trial court's refusal to direct a verdict would be an idle and useless ceremony in the light of the recent decisions of the Supreme Court. This is so regardless of what we might think of the sufficiency of the evidence in this respect. The fact is, so we think, that the Supreme Court has in effect converted this negligence statute into a compensation law thereby making, for all practical purposes, a railroad an insurer of its employees. (See dissent of Mr. Justice Roberts in *Bailey* v. *Central Vermont Ry.* 319 U. S. 350, 358.)"
>
> • • • • •
>
> "Moreover, not only are these issues to be decided by the jury but its decision is unassailable. In fact, it is difficult to conceive of a case brought under this Act where a trial court would be justified in directing a verdict."

The rule that the jury's finding as to negligence and proximate cause is conclusive was concretely applied to the facts of this case even though there was "no proof" (R. 163) of negligence or proximate cause between the claimed negligence and the accident.

A pronouncement by a Court of review that a jury's verdict in a negligence action is conclusive is startling, to say the least and particularly so in a case where the reviewing court acknowledges that there was "no proof" as to negligence or proximate cause. This Court has repeatedly reiterated that "in every case, it is the duty of the judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different finding," (*Baltimore & Ohio R. R. Co.* v. *Groeger*, 266 U. S. 521, 524), and that "when the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with applicable practice without submission to the jury, or by judgment notwithstanding the verdict." (*Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 479.)

The administration of justice has not reached the point where the failure to prove that an employee's death was caused by his employer's negligence furnishes ample grounds for sustaining a jury finding to the contrary. If absence of either negligence or proximate cause is sufficient to support a judgment, under a statute which makes negligence the basis of liability, then the Constitutional guarantee that no one shall be deprived of property without due process of law is nothing more than an empty phrase. Certainly this Court has not so held, either in the case of *Tennant* v. *Peoria & Pekin Union Railway Co.*, 321

U. S. 29, specifically relied upon by the majority, or in any of the other decisions referred to in the majority opinion.

In all of the recent decisions referred to by the Court of Appeals, it is specifically recognized that there must be proof of negligence before a railroad is liable in actions under the Act, and that whether there is sufficient evidence to warrant the jury's finding of either negligence or proximate cause, is a question subject to review. This Court has never held that a jury's finding on either of these questions is conclusive. In the *Tennant* case, this Court undertook a detailed review of the evidence as to causation between negligence and the injury, and finally concluded that "the ultimate inference that Tennant would not have been killed but for failure to warn him is therefore supportable." (p. 34.) This is an express recognition that there still must be "some proof" of causal connection between negligence and injury. And even in *Lavender* v. *Kurn*, 90 L. Ed. 692 (Adv. Op.), in which the majority of the Court of Appeals characterized the jury's finding as amounting to "nothing more than a guess on its part" (R. 162), this Court specifically said that "only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear." (p. 697.) Again this is an express recognition that there must be "some proof" to support the jury's finding and that if there is "no proof" the jury's verdict can be set aside.

If it is true that the law now is that jury verdicts in actions under the Act are unassailable, even though there is "no proof" to sustain them, it should be so specifically stated by this Court, rather than to be so declared by an intermediate court of appeal. Certainly the revolutionary doctrine announced by the majority of the Court of Appeals in this case requires a further review of the judgment by this Court.

B.

The Majority of the Court of Appeals, in Holding That Instructions to the Effect That It Was Petitioner's Duty to Furnish Respondent's Decedent With a Reasonably Safe Place in Which to Work Were Properly Given Under the Facts, Has Misconstrued the Decision of This Court in Bailey v. Central Vermont Railway, 319 U. S. 350.

At Respondent's request, the Court gave two instructions to the jury to the effect that it was Petitioner's duty to furnish Respondent's decedent with a reasonably safe place in which to work (R. 129). The majority of the Court of Appeals held that the giving of these instructions did not constitute error, even though there was no evidence that the premises in question were not reasonably safe or that there was any causal connection between the physical condition of the premises and the accident.

The rule requiring a master to furnish a servant a reasonably safe place to work has reference to the physical condition of the place itself and not to the negligent acts of fellow employees. *Peterson* v. *Oak Park El. R. R. Co.*, 260 Ill. 280, 282; *Keefe* v. *Armour & Co.*, 258 Ill. 28, 34. The majority of the Court of Appeals recognized that many decisions supported petitioner's contention but held they should not be followed because of the decision in *Bailey* v. *Central Vermont Railway*, 319 U. S. 350 (R. 165). We respectfully submit that the Circuit Court of Appeals has misconstrued the decision of this Court in the *Bailey* case. While it is true there was no defect in the premises in the *Bailey* case, still there was a causal connection between the accident and the dangerous condition of the place itself where the plaintiff was required to perform his work.

In the instant case, there was no evidence that the condition of the place where Respondent's decedent was just prior to the time he was killed had any causal connection

whatsoever with his death. Certainly, under the common law, it was never held that an employer breached his duty to furnish an employee a reasonably safe place to work if the employee is injured by the negligent acts or omissions of fellow-employees, by reason of which the place is rendered unsafe or dangerous. This Court has held that where an employee is injured by the negligent act or omission of a fellow employee the master has not breached the duty of furnishing a reasonably safe place to work. (*Martin* v. *Atchison, Topeka & S. F. R. R. Co.*, 166 U. S. 399, 403; *Armour* v. *Hahn*, 111 U. S. 313, 318.)

At the instant of the injury, every place in which an injury is inflicted is unsafe. Even though the jury was of the opinion that Petitioner was not negligent in the manner in which it moved the cars on track 6, it might have based its verdict of guilty on these instructions on the reasoning that, since Griswold was killed, the premises must certainly have been unsafe, or else he never would have been killed. If the jury's finding as to negligence is as conclusive as the majority of the Court of Appeals says it is, the least the railroad is entitled to is instructions applicable to the facts in the case.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari be granted.

Respectfully submitted,

HAROLD A. SMITH,
DOUGLAS C. MOIR,
EDWARD J. WENDROW,
Attorneys for Henry A. Gardner, as Trustee of The Alton Railroad Company.

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Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ROYAL W. IRWIN,
Attorney for Respondent.

THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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Summary of Argument.

The only questions presented were questions of fact which were decided by the jury. There was evidence that the defendant negligently permitted a cut of cars to be moved through a switch yard in the night-time without warning to the deceased who was at his proper place of employment adjacent to said track. There was evidence that the defendant negligently failed to give the deceased the customary warning of the approach of the cars on the track next to where he was working. There was also evidence of negligence that the defendant failed to comply with the rules which required the defendant to place a white light upon the leading car being pushed through the yard in the night-time. The rule in the Federal Court is that ordinarily the appellate courts do not review the verdicts of juries, but only the acts of the judge. The trial judge alone has the right and duty to set aside the verdict.

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Respondent.

REASONS FOR NOT ALLOWING WRIT OF CERTIORARI.

The Pertinent Facts.

Plaintiff's deceased, Griswold, was head brakeman on defendant's train which had been made up and was about to pull out of the switch yard at Bloomington, Illinois. The yard consisted of about 15 parallel tracks running north and south. Train No. 93, consisting of about 54 cars, was standing on track 7 headed south (Tr. 9). The engine was attached to the south end of the train, the caboose at the north end, the air was connected and inspected and the train was about ready to leave (Tr. 11, 17).

It was the duty of the conductor to check the cars in the train, which he did commencing at the head end walking to the rear end (Tr. 17). The accident occurred at 3:40 A. M. January 25, 1943 (Tr. 11). It was dark (Tr. 40). The conductor carried a lantern and could be seen walking along the side of the train between tracks 6 and 7 making his check (Tr. 17). There were a number of other employees working on the train between tracks 6 and 7 who also carried lanterns (Tr. 17) and it was necessary but difficult to follow the conductor's lantern and distinguish it from the lanterns carried by the other men (Tr. 25). A signal was momentarily expected from the conductor to pull out and, therefore, it was the duty of the engineer, the fireman and Griswold to watch carefully along the train between tracks 6 and 7 for the conductor's signal and not to be confused by a signal given by any other workman (Tr. 25).

Griswold was required to ride on the head end of the train (Tr. 11). He had to be near the engine at the time of the accident in order to take his place when the train pulled out. He had the privilege of riding either in the cab of the locomotive or in the cupola, a compartment in the back of the tender (Tr. 11). It was customary and proper for Griswold, together with the engineer and fireman to look for the signal from the conductor (Tr. 25). Inasmuch as the conductor was between tracks 6 and 7, it was proper for Griswold to be on the ground between tracks 6 and 7 to look out for his signal and to be ready to get upon the engine when it started out.

While the engine was standing there, Griswold went down the steps from the cab to the space between tracks 6 and 7 (Tr. 26). Immediately thereafter, the defendant railroad company caused a long cut of freight cars to be backed in a northerly direction on track 6 moving slowly and silently (Tr. 34) and without a light or signal or a man riding on

the leading end thereof (Tr. 22, 43). The engineer and fireman on the locomotive had no notice of the approach of these cars and did not learn of the movement of those cars past the locomotive until they heard them going by (Tr. 21). As the first car of this cut went by the engine, the engineer saw the flash of a lantern (Tr. 23) which was presumably from Griswold's lantern when he was struck by the first car. His body was found badly mangled several hundred feet to the north (Tr. 37).

Negligence Charged.

The complaint charged defendant with the following acts of negligence: (a) The defendant negligently caused, permitted and allowed said cars to strike against Griswold. (b) The defendant negligently failed to give Griswold suitable, sufficient and proper notice, signal and warning of the approach of the cars on track 6. (c) The defendant negligently caused said cars to be propelled on track 6 without lights or signal on the leading end thereof (Tr. 2, 3).

Questions of Fact Decided by the Jury.

(A) Griswold being the head brakeman was required to ride on the locomotive or tender when the train was in motion (Tr. 11). He had to be either on or near the engine at the time he was killed in order to get upon it when it pulled out. In other words, he was at a place where he had to be. It was Griswold's duty, together with the engineer and fireman, to look out for the starting signal presently expected from the conductor (Tr. 25). Presumably Griswold descended from the engine to the space between tracks 6 and 7 to better look for the conductor's signal.

Tracks 6 and 7 were 8½ feet apart (Tr. 13). The over-

hang of freight cars is 27 inches (Tr. 13). Therefore, the available space between cars standing on tracks 6 and 7 was 4½ feet (Tr. 13).

In addition to the conductor, who was required in the performance of his duties to be between tracks 6 and 7, while checking the cars of his train (Tr. 17) there were at least two car inspectors who were required to work between tracks 6 and 7 checking air brakes and couplings preparatory to the departure of the train (Tr. 17, 25). There were, therefore, four employees who were rightfully in the space between tracks 6 and 7, all of which the railroad company had notice (Tr. 17). Nevertheless, the railroad company caused a long cut of freight cars to be backed slowly and silently in a northerly direction on track 6 without a light or a man on the end of the first car and without taking any precautions to warn or inform any of the four employees between tracks 6 and 7 of the approach of this train (Tr. 43).

The facts in this case are similar to the case of *Tiller* v. *Atlantic Coast Line Railroad Co.*, 318 U. S. 54, 87 L. Ed. 610 where a policeman employed by the railroad company was between two tracks inspecting seals on cars and was killed by cars shunted on an adjacent track in the nighttime without notice or warning to him.

The defendant in the United States Circuit Court of Appeals contended that there was no negligence, relying upon *Aerkfetz* v. *Humphries,* 145 U. S. 418 and *Toledo, St. Louis and Western Railroad Co.* v. *Allen,* 276 U. S. 165. That line of argument now seems to have been abandoned by the defendant.

This case is also similar to the case of *Tennant* v. *P. & P. U. R. Co.,* 321 U. S. 29, 88 L. Ed. 520 where it was charged that the engineer negligently backed an engine and cars

without ringing the bell, the engineer not knowing the precise whereabouts of Tenant. The Court there said:

> "A movement without a warning, was clearly dangerous to life and limb."

It was a question of fact whether the defendant was negligent in causing this cut of cars in the night-time to be moved over track 6 without any light or signal on the end and no warning given to employees whom the railroad had ample notice might be engaged in the performance of their duties between tracks 6 and 7. The space between cars 6 and 7 was very narrow and the railroad company must have known that there was danger in a car being moved in on track 6, striking against an employee between tracks 6 and 7.

(B) It was likewise a question of fact for the jury whether the defendant negligently failed to observe the custom of warning employees of the approach of cars on the adjoining track.

It was the practice to warn and inform employees in exposed places of the movement of the cars. Scharfenberg was a yard switchman who was going to make a coupling between the moving cut of cars and cars already standing on track 6 (Tr. 40). Kettenring, the air inspector had just finished inspecting the cars on track 7 and was writing out his report on the side of one of the cars when Scharfenberg saw the cut without lights approaching. Scharfenberg on previous occasions warned Kettenring of approaching cars under similar circumstances. He testified: "I have on numerous occasions warned him of approaching cars when I would see them, if I had any doubts that they didn't see them coming." (Tr. 44). He said to Kettenring "Look out for the cars on track 6 (Tr. 45)." Scharfenberg further testified: "Well, it is a general practice for us railroad men to be very alert and help others to be alert, and

I called his attention to them especially, I saw his back to the movement that we were making (Tr. 46)." Kettenring testified when asked whether anybody called his attention to those cars "I was pretty close to Scharfenberg when they went by. Well, he did say, like he always says, though, whenever they shove a track to be careful, 'We are shoving track,' so and so, and I always watched more closely than any other (Tr. 56)."

No warning was given Griswold of the approach of the train. In so failing to follow the common practice of warning employees in dangerous positions, the railroad was guilty of negligence.

(C) The evidence showed that the defendant was negligent in not complying with its rules.

The Book of Rules required "When cars are pushed by an engine, except when shifting or making up trains in yards, a white light must be displayed on the front of the leading car by night (Tr. 69)." The engineer (Tr. 21), the fireman (Tr. 37) and Scharfenberg (Tr. 43, 44) all testified that there was no white light displayed on the front end of the leading car. It was a question of fact for the jury whether the failure to display a white light on the leading car was the cause of plaintiff's death. The plaintiff's evidence stood uncontradicted. It was negligence to cause this cut of cars to be moved along track 6 without a white light displayed on the front of the leading car when the railroad company knew that Griswold and other employees were engaged in the performance of their duties between tracks 6 and 7.

Proximate Cause.

Petitioner contends that the negligence of the defendant in failing to warn Griswold of the approach of the cars was not the proximate cause of the accident. In *Tennant v. Peoria & Pekin Railroad Co.*, 321 U. S. 29, the Court held:

> "That was a question of fact for the jury whether the failure to ring a bell before starting a locomotive was negligence."

And so in this case it was a question of fact for the jury whether the failure to give warning to Griswold was the cause of his death.

Given Instructions.

The Trial Court, at the request of the plaintiff, instructed the jury:

> "It was the duty of the employer of the deceased in this case to have used ordinary care and prudence in furnishing to the deceased, at the time of the accident in question, a reasonably safe place in which to work (Tr. 129)."

The instruction was not peremptory and did not direct a verdict. It has always been the law that it is the duty of an employer to exercise ordinary care to furnish his employee a reasonably safe place in which to work. A place to work may be rendered unsafe not only by reason of defects in the place itself, but by the manner in which the employer carries on his work. In the instant case, the moving of cars in the night-time without notice or warning when the employer knew that other employees were engaged in the performance of their work adjacent to said track, made the place which the employer furnished to the employees an unsafe place.

The defendant is not in position to claim that his counsel made a valid objection to the instruction. During the course of the argument before the Court, the Court said:

> "Suppose they operated a train down there in an unsafe manner. Isn't that failure to furnish a safe place to work, so far as the employee is concerned?
>
> "Mr. Moir: That may be. That may be." (Tr. 104).

The defendant did not make a valid objection.

The attention of the Court is directed to *Blair* v. *Baltimore & Ohio R. R. Co.*, 323 U. S. 600, 89 L. Ed. 490, 494, where it appeared that the injury resulted not from a defect in premises but from the way the work was carried on. The Court said:

> "The negligence of the employer may be determined by viewing its conduct as a whole * * * and especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the other."

The giving of the instruction could have worked no harm to the defendant. It correctly states the law and is based upon the evidence before the jury. There can be no question that the place where Griswold was required to work was rendered unsafe by the manner in which the defendant conducted its business.

Rule 61 of the Rules of Civil Procedure provides that no defect in any ruling or order of the Court is ground for granting a new trial unless it is inconsistent with substantial justice, and the Court must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties.

Conclusion.

The evidence amply supports the charges of negligence made against the defendant. The questions involved were purely questions of fact which were properly decided by the jury. We urge the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

ROYAL W. IRWIN,
Attorney for Respondent.